No. 46068-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tim Duggins,

Appellant.

Thurston County Superior Court Cause No. 13-1-00961-1

The Honorable Judge Carol Murphy

Appellant's Reply Brief

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I. MR. DUGGINS DID NOT MAKE A PERSONAL EXPRESSION OF KNOWING, INTELLIGENT, VOLUNTARY WAIVER OF HIS RIGHT TO A JURY TRIAL.

An accused person must be tried by a jury absent a personal expression of waiver of the right to a jury trial. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). A written waiver, alone, is not sufficient. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 240 n. 10, 165 P.3d 391 (2007).

Here, Mr. Duggins never personally expressed the intent to waive his right to a jury trial. RP 3-5. Nonetheless, the state argues that Mr. Duggins made a personal expression of waiver by signing a lengthy drug court contract, which included a sentence regarding jury waiver. Brief of Respondent, pp. 1-5. Respondent acknowledges that a writing "cannot be regarded as conclusive" evidence that an accused person validly waived his/her right to a jury trial. Brief of Respondent, p.5. But the state cannot point to any evidence that Mr. Duggins made a knowing, intelligent, and voluntary waiver of that right beyond the fact that he signed the drug court contract. Brief of Respondent, pp. 1-5. Respondent's argument fails.

Absent a personal expression of waiver, the state cannot meet its burden to demonstrate that Mr. Duggins knowingly, voluntarily, and intelligently waived his right to trial by jury. *Stegall*, 124 Wn.2d at 725.

Mr. Duggins's convictions must be reversed and his case remanded for a new trial. *Id.*

II. THE INFORMATION CHARGING MR. DUGGINS WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE ANY CRITICAL FACTS.

Any offense charged in the language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Here, the state cannot point to *any* facts related to Mr. Duggins's charges contained in the Information. Brief of Respondent, pp. 5-10. Indeed, the charging language in Mr. Duggins's case contains only the statutory language. CP 3. That language is not "accompanied with … a statement of the facts or circumstances" of the case. *Russell*, 369 U.S. at 763-64. Accordingly, the charging document is constitutionally deficient. *Id.*

The state's claim that the Information contains all essential elements of the charge is inapposite.[1] Brief of Respondent, p. 7. Indeed,

[1] The state relies on caselaw involving a claim that a charging document was insufficient for failing to allege non-statutory elements of the offense. Brief of Respondent, p. 6 (*citing State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991)). But the Information in *Kjorsvik* contained the facts essential to the charged crime: the name of the alleged victim and the

Mr. Duggins does not claim that the document fails to allege all essential elements. Rather, absent any facts at all, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Russell*, 369 U.S. at 763-64. The state's arguments regarding the elements of the offense are misplaced.

The state also notes that a charging document need not describe "exactly how" the offense was allegedly committed. Brief of Respondent, pp. 7-8 (*citing State v. Noltie*, 116 Wn.2d 831, 843, 809 P.2d 190 (1991); *State v. Elliott*, 114 Wn.2d 6, 13, 785 P.2d 440 (1990)). The state relies on authority holding that the prosecution is not required to allege the specific alternative means in the information.[2] *Id.* Unlike here, the charging document in each of the cases the state cites included the essential facts necessary to identify and differentiate the offense alleged. *Noltie*, 116 Wn.2d at 841 (Information specified identify of alleged victim); *Elliott*, 114 Wn.2d at 8 (Information specified identity of alleged victims).

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item that was allegedly stolen. *Kjorsvik*, 117 Wn.2d at 96. In Mr. Duggins's case, the charging document is void of any such facts. CP 3. Respondent's reliance on *Kjorsvik* is misplaced.

[2] The state also relies on a misdemeanor case explicitly detailing that the requirement of charging critical facts is relaxed for misdemeanor citations. Brief of Respondent, p. 8 (*citing State v. Plano*, 67 Wn. App. 674, 677, 838 P.2d 1145 (1992) (unlike an Information, " a citation may not be deemed insufficient for failure to set forth the essential facts of the offense"). *Plano* is completely inapposite to this felony case.

Likewise, the state cites to a case in which the accused claimed that the charging language added an element under the law of the case doctrime. Brief of Respondent, p. 8 (citing *State v. Benitez*, 175 Wn. App. 116, 124 P.3d 877 (2013)). *Benitez*, which does not address the constitutional sufficiency of a charging document, is also inapposite.

Mr. Duggins does not claim that the Information was deficient for failing to allege a specific alternative means of committing an offense. Again, the state misapprehends the issue.

The critical facts in Mr. Duggins's case cannot be found by any fair construction of the charging document. CP 3; *Rivas*, 168 Wn. App. at 887. Accordingly, the Information is constitutionally deficient and Mr. Duggins's convictions must be reversed. *Russell*, 369 U.S. at 763-64. Nonetheless, the state suggests that reversal is not required because Mr. Duggins should have requested a bill of particulars. Brief of Respondent, p. 8 (*citing Noltie*, 116 Wn.2d at 843). But the *Noltie* court found that the charging language in that case was constitutionally adequate. *Noltie*, 116 Wn.2d at 843 ("Washington courts have repeatedly distinguished informations which are constitutionally deficient and those which are merely vague"). In that context, the court noted that any potential confusion regarding the charging language could have been cured by a bill of particulars. *Id.*

Here, on the other hand, Mr. Duggins was presumptively prejudiced by the constitutionally defective information. *State v. Rivas*, 168 Wn. App. 882, 888, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013). Reversal is required without any additional showing by Mr. Duggins. *Id.*

The Information is constitutionally deficient. Mr. Duggins's convictions must be reversed and the charges dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

III. MR. DUGGINS WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THIS HIS OFFENSES COMPRISED THE SAME CRIMINAL CONDUCT.

Defense counsel provides ineffective assistance by failing to validly argue that two offenses comprise the same criminal conduct for sentencing purposes. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013). Here, Mr. Duggins's attorney provided ineffective assistance for failing to argue that his burglary and theft convictions should be counted as the same criminal conduct.

The accused is prejudiced by counsel's failure to raise same criminal conduct if there is a reasonable probability that the court would have applied the rule in calculating his/her offender score. *Phuong*, 174 Wn. App. at 548. Even so, the state argues that Mr. Duggins cannot demonstrate prejudice because the sentencing court had the discretion to apply the burglary anti-merger statute to find that his offenses did not constitute the same criminal conduct. Brief of Respondent, pp. 13-14 (*citing State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992)). But

the *Lessley* court also found that the facts of that case did not support a finding of same criminal conduct.[3] *Id.* at 778-79.

The facts of Mr. Duggins's case do support such a finding. CP 19-20; RCW 9.94A.589(1)(a). Indeed, the state appears to concede that Mr. Duggins's convictions meet the same criminal conduct test. Brief of Respondent, p. 13. Additionally, Mr. Duggins's conduct of stealing sunglasses from a shed behind a consignment shop was far less egregious than the armed kidnapping and assault at issue in *Lessley*. *See Lessley*, 118 Wn.2d at 775. There was a reasonable probability that the court would have counted Mr. Duggins's convictions as the same criminal conduct, despite the court'. *Phuong*, 174 Wn. App. at 548. Mr. Duggins was prejudiced by his attorney's deficient performance. *Id.*

Mr. Duggins's attorney provided ineffective assistance of counsel by failing to properly raise that his two offenses comprised the same criminal conduct. *Id.* Mr. Duggins's case must be remanded for resentencing. *Id.*

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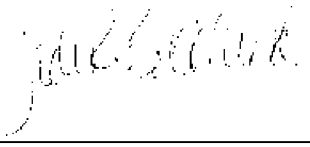
[3] Additionally, the reasoning behind *Lessley* is that the court should retain the discretion to punish burglary separately even when the longer range for a greater crime would normally determine the length of the sentence. *Lessley*, 118 Wn.2d at 781 ("When a current burglary is not counted as a conviction for purposes of calculating the offender score, because it is considered the same criminal conduct as the more serious crime committed during the burglary, the result is disproportionate"). In Mr. Duggins's case, burglary *was* the greater offense, carrying a much longer standard range than second degree theft. *See* CP 54. Respondent's argument regarding the anti-merger statute is inapposite to Mr. Duggins's ineffective assistance claim.

CONCLUSION

For the reasons set forth above and in Mr. Duggins's Opening Brief, Mr. Duggins's convictions must be reversed. In the alternative, his case must be remanded for resentencing.

Respectfully submitted on November 13, 2014,

BACKLUND AND MISTRY



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I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

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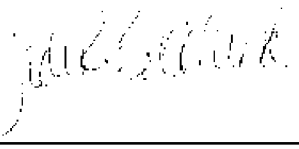

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